



Preserving America's Heritage

July 26, 2013

Ms. Mona K. Wright
 Cultural Resources Program Manager
 Department of Energy
 Richland Operations Office
 P. O. Box 550
 Richland, WA 99352



Ref: *Department of Energy request to review two "no historic properties affected" findings, and provide its opinion on the steps the Department of Energy takes to identify historic properties in similar undertakings*

Dear Ms. Wright:

On July 2, 2013, the Advisory Council on Historic Preservation (ACHP) received your letter notifying us of disagreements with the Washington State Historic Preservation Officer (SHPO) regarding the requirements of Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR 800) with respect to two undertakings. The Department of Energy—Richland Operations' (DOE/RL) has made findings of "no historic properties affected" for the expansion of an existing borrow pit and for cleanup of a small, isolated dump site. After review of the documentation accompanying your request, we see no reason to believe that DOE/RL incorrectly or inappropriately reached its "No Historic Properties Affected" findings for these two undertakings. Our rationale for reaching these conclusions, along with our comments on the reasonableness of the identification methodology DOE/RL utilizes for similar undertakings, are detailed below. Regarding the two findings of "no historic properties affected", once DOE/RL sends the ACHP, Washington SHPO and other consulting parties a summary of its final decisions, evidencing consideration of our opinion in this letter, DOE/RL's responsibilities under Section 106 of the NHPA will be fulfilled for these two undertakings.

Review of two "no historic properties affected" findings: In the two cases you have asked the ACHP to review—a 10.6 acre borrow pit expansion on disturbed land in the 100-H Area to provide sand and gravel to backfill remediated waste sites, and cleanup of an approximately 150 foot by 150 foot dump site in the 100-H Area containing potentially hazardous material from the pre- and Hanford-era periods—the Washington SHPO agreed with the delineation of the Area of Potential Effects (APE) (in letters to DOE/RL dated August 6, 2012, and February 5, 2013) but disagreed with the findings of "no historic properties affected" (letters to DOE/RL dated February 28, 2013, and May 28, 2013). The basis for the SHPO's objection is the same—it requests that DOE/RL contact the Bonneville Power Administration (BPA) for information on Traditional Cultural Properties it identified in advance of the Midway-Benton transmission line corridor across the Hanford Reservation last year (a BPA undertaking).

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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On June 19, 2013, we responded to a request from BPA to review a similar dispute it had with the Washington SHPO about a Section 106 finding of "No Adverse Effect" for another project on the Hanford Reservation (involving powerline maintenance). As with the two projects under discussion here, the Washington SHPO also disagreed with BPA's finding, using identical language about the need to contact other BPA staff about TCP's it had identified in the Midway-Benton project. Our advisory opinion to BPA was that it had indeed made a "reasonable and good faith" effort to identify historic properties and their subsequent assessment of no adverse effect was not unreasonable. In our reply we stated that, based on tribal consultation BPA concluded that *"these particular TCPs (identified by BPA) are well outside the Area of Potential Effects ... (therefore) we believe that additional information about the specific location and boundaries of these TCPs is irrelevant to the issue of whether the referenced undertaking will adversely affect a historic property. In addition, the SHPO's response does not provide a mechanism to bring closure to this step in the Section 106 process for this undertaking."*

In the present case, the TCPs identified during BPA's Midway-Benton project also are well away from the 10.6 acre APE for the borrow pit and the 3.75 acre APE for the waste site. Therefore, our opinion remains that consultation with BPA about these TCPs is not pertinent to the issue of whether there are historic properties that may be affected within the borrow pit or waste site APEs. As for the steps DOE/RL did take to identify historic properties, according to the documentation provided, previous historic property surveys and inventories on or near the APEs were reviewed (at least 7 surveys have been conducted near the borrow pit over the years, and the SHPO agreed with DOE/RL that the waste site itself was not eligible for the National Register), and archaeological surveys within the APEs were conducted. Information on any known TCPs within the APEs was requested from the Tribes, and DOE/RL reviewed the results of previous field surveys and the walkovers with tribal members. New field visits for tribes to both the borrow area and waste site were then scheduled. Based on the results of these identification efforts, DOE/RL concluded that no historic properties existed within the 10.6 acre APE for the borrow pit expansion or the 3.5 acre APE for the waste site. This information was provided within the Cultural Resources Reviews which were distributed among the SHPO and Umatilla, Yakama, Nez Perce Tribes, and Wanapum Bands.

After initially agreeing to DOE/RL's no historic properties affected finding, the Washington SHPO withdrew its concurrence (letters dated September 6 and October 15, 2012), noting that the Yakama had concerns that a TCP may exist within the borrow pit's APE, and requested that DOE/RL contact the ACHP and National Park Service about information they had on historic properties within the APE. DOE/RL contacted these parties, but none had knowledge of any TCPs within the 10.6 acre APE. According to the documentation, DOE's review of its "paper records and field discussions with tribal representatives during previous surveys and field walk downs" compiled over the years did not indicate the presence of an unidentified TCP within the APE, nor had anything been noted or mentioned during the specific field visit in August 2012 or the March 2013 visit to several borrow pits in the area. The Yakama also did not offer specific information about the presence of a TCP within the borrow pit APE, other than arguing that the lack of a comprehensive, Hanford Site-wide TCP study makes it difficult to conclude that any specific area is absent of TCPs. Because no specific information was provided to DOE/RL over the years about a TCP on that portion of the existing borrow area slated for expansion, and also based on a lack of information on a TCP based on previous tribal consultation and field visits to the area, DOE concluded at this point that it had made a reasonable and good faith effort to identify historic properties, and that its finding of "no historic properties affected" was appropriate. At this point the Washington SHPO objected again (letter dated February 28, 2013). Unable to resolve these matters, it was at this point that DOE/RL requested that the ACHP review these findings to resolve the outstanding issues.

Based on the information provided, it is the ACHP's opinion that DOE/RL has made a reasonable and good faith effort to identify historic properties as required by the Section 106 regulations, and their resulting findings of "no historic properties affected" are not unreasonable or inappropriate for the referenced borrow pit expansion and the waste dump cleanup.

The ACHP's views are advisory and DOE/RL must take them into account in making the final decision to move forward with these undertakings. Again, once DOE/RL sends the ACHP, SHPO and other consulting parties a summary of its decisions, evidencing consideration of our opinion in this letter, DOE/RL's responsibilities under Section 106 of the National Historic Preservation Act will be fulfilled for the referenced undertakings.

ACHP opinion on the reasonableness of DOE/RL's identification methodology for similar undertakings. DOE/RL has asked for the ACHP's opinion regarding the steps DOE/RL takes to identify historic properties for undertakings similar to the borrow pit and waste site and specifically, whether their procedures meet the "reasonable and good faith" standard.

It is important to reiterate that the Section 106 regulations do not require that a federal agency survey 100 percent of, or identify every historic property within, the APE for any undertaking; nor does it require a federal agency to prove the *absence* of historic properties within the APE. A federal agency's identification effort can be considered reasonable in scope and carried out in good faith when, in consultation with the SHPO/THPO and others as appropriate, it has considered the factors specified in the Section 106 regulations at 36 CFR 800.4(b)(1) that are used to determine the level of effort it will make—the magnitude and nature of the undertaking, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the APE. It is important to note in this context that one of the reasons the Section 106 regulations contain a post-review discovery provision (at 800.13) is that the level of effort to identify historic properties is reasonable and carried out in good faith, but not necessarily to a standard that ensures every historic property will be identified prior to carrying out the undertaking.

In the documentation we have reviewed, DOE/RL notes that its APE determinations are sent to the SHPO and Indian tribes for review, in addition to previous surveys and other Section 106 activities in the vicinity of the APEs. Based on these reviews historic property surveys are carried out as required. In order to identify any historic properties of religious and cultural significance to Indian tribes that may lie within the APE, we understand that DOE reviews both existing literature and field-visit information generated over the years, and actively solicits current tribal views and perspectives on its undertakings and their potential to affect historic properties. In addition to the exchange of documentation, discussions at regularly scheduled meetings, and arranged site visits where Indian tribes have the opportunity to inspect project areas, DOE/RL also has cooperative agreements with the Yakama, Umatilla and Nez Perce (and a separate arrangement with the Wanapum, a non federally recognized tribe), through which it provides financial assistance to the tribes, in part, to assist DOE/RL in meeting its Section 106 responsibilities. We understand that most of these tribes use a portion of the funding provided to compile oral histories and TCP inventories of the Hanford Reservation, including those that may exist within project areas. In addition, we understand that DOE fully acknowledges the "special expertise" these tribes possess in identifying and assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them.

Carrying out these steps—review of existing information; timely discussion with the SHPO and Indian tribes and accommodation of their views; encouraging and facilitating site visits where possible to assist in identifying historic properties and assessing possible effects to them; and committing adequate

resources (time, personnel, funding) to accomplish these tasks—are those steps set out in the Section 106 regulations that meet the “reasonable and good faith” identification standard. As for the reasonableness of DOE/RL’s broader Section 106 identification methodology, we believe it is both reasonable in scope and sound in methodology.

In reviewing the records for these two undertakings, we found that the documentary trail of the results of meetings, or of actions taken (or not taken) in response to consulting parties’ suggestions, was not always clearly presented or readily accessible. Correspondence with some consulting parties appears to consist almost entirely of emails, while others included a formal exchange of letters. We encourage DOE/RL to compile a clearer documentary record on those decisions reached in the Section 106 process, and provide evidence of closure, to better ensure that the consulting parties have complete information on the process through which DOE/RL met its Section 106 responsibilities. We also encourage federal agencies to seek clarification on any comments received from any consulting party if they do not seem appropriate or relevant to the issue at hand.

Also, in reviewing the documentation on several undertakings on the Hanford Reservation, we note that some consulting parties have requested a site-wide inventory of historic properties (a.k.a. “Section 110 inventory”) as necessary to meet the Section 106 “reasonable and good faith” identification standard. It is important to note that Section 106 focuses on the identification of historic properties and resolution of any adverse effects within the APE only. Section 110(a)(2)(A) of the NHPA calls for federal agencies to establish preservation programs that will ensure that “historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register.” We agree that it is desirable for any property-managing agency to have a complete inventory of its historic properties to aid in their management, and we encourage agencies to undertake such inventories as available resources permit, but it is not a requirement in the Section 106 compliance process.

Finally, we again strongly encourage all parties with interests in the Hanford Reservation to develop a comprehensive Programmatic Agreement (PA) to guide the management of all historic properties on the Hanford Reservation. Such an agreement should involve, at a minimum, DOE/RL, Fish and Wildlife Service, Bonneville Power Administration, the Washington SHPO, the Yakima, Umatilla, Nez Perce, and Wanapum Tribes and Bands, the ACHP, and others as appropriate. A PA would provide a streamlined, tailored mechanism for the federal agencies to advance their stewardship responsibilities as they comply with Section 106 of the NHPA. The PA could, among other things:

- Streamline the Section 106 review process for more focused attention on those undertakings that have the most potential to adversely affect historic properties;
- Clarify the appropriate use of the “no potential to cause effects” finding in order to help determine which undertakings can go forward with no or limited outside review, to free up limited SHPO and tribal resources;
- Provide additional tribal and public benefit from resource management through enhanced outreach and education; disseminating information to tribal communities, interested members of the public, and the general public to foster a better understanding of the history and cultural heritage of the Hanford area;
- Encourage creative and innovative ways to mitigate adverse effects to historic properties; and
- Seek to develop a better mechanism for the safekeeping and sharing of sensitive information with the Washington SHPO.

We welcome the opportunity to assist you should you wish to move forward with such an agreement.

Should you have any questions or wish to discuss this matter further, please contact me or Dr. Tom McCulloch at 202-606-8554, or by e-mail at tmcculloch@achp.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Reid J. Nelson", with a long horizontal flourish extending to the right.

Reid J. Nelson
Director
Office of Federal Agency Programs